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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 373.

ALPINE MacGREGOR, Petitioner,

v.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, a Corporation, Respondent.

REPLY BRIEF FOR PETITIONER.

WILLIAM B. JASPERT,
Counsel for Petitioner.

1301 First National Bank Bldg.,
Pittsburgh, Pa.

September, 1944.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner deems it necessary to comment briefly on the question raised in respondent's brief as to this Court's jurisdiction.

Respondent, while admitting that this Court has jurisdiction to review a judgment of a state court under 28 U. S. C. 344, asserts that petitioner has not met the burden of showing jurisdiction because no cases pertinent to the source of jurisdiction under 28 U. S. C. 344 have been cited. In *Waters Pierce Oil Co. v. Texas,* 212 U. S. 86, this Court held that it has jurisdiction to review state courts' decisions denying federal rights whether

those pertaining to the construction of federal or state statutes or to certain rights, immunities or privileges of federal origin especially set up in the state court and denied by the rulings and judgment of that court.

The second point raised by respondent is whether a federal question is involved in the decision below. The assignment of errors, p. 12 of the petition, clearly establish that federal questions are involved and have been passed upon by the state court. In the opinion at the very outset, the Court states the issue to be the question of whether under this Court's decision in *Sola Electric Co. v. Jefferson Electric Co.,* 317 U. S. 173, petitioner can attack the legality of the license agreement by asserting invalidity of the licensed patent. The question of legality of the agreement involves the issue of violation of the Sherman Anti-trust Law and the question of validity of the patent involves the federal patent laws. That the Pennsylvania Supreme Court ruled on these questions is evident from the opinion, in which the Court says:

> "The first question for us to decide is whether the Sola case supra, removes the estoppel ordinarily on a patentee to attack the validity of a patent when the license contract provides for price fixing."

The Court then discussed this Court's decision in the *Sola* case at great length. It further appears in the appendix, p. 9 of the petition, that these very questions were asserted by petitioner to be the issues on appeal in the Pennsylvania Supreme Court. The case at bar obviously involves federal questions that are directly in issue in the litigation and are not merely frivolous, as stated by respondent.

The third point raised by respondent's reply on the question of jurisdiction is with respect to the finality of the judgment below, respondent contending that the judgment of the trial court in this case was for an order of accounting and is not final. In *Department of Banking v. Pink,* 317 U. S. 264, 268, this Court said:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final, * * * but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court."

There are many cases by this Court holding that a judgment or decree which terminates the litigation between the parties on the merits, so that the lower court may execute its judgment on affirmance, is final; *Whiting v. Bank of U. S.,* 13 Pet. 6, 10 L. Ed. 33; *Forgay v. Conrad,* 6 How. 201, 12 L. Ed. 404; *Board of Commissioners v. Lucas,* 93 U. S. 108; *Bostwick v. Brinkerhoff,* 106 U. S. 3; *Mower v. Fletcher,* 114 U. S. 127; *Chesapeake & Pot. Tel. Co. v. Manning,* 186 U. S. 238.

In the case at bar the order of the Pennsylvania Supreme Court reads:

> "The judgment in the nature of a decree is affirmed; costs to be paid by the appellant."

The order affirmed (R. 331 a) reads as follows:

> "And now, to wit, January 24, 1944, exceptions ex parte defendant to findings of fact, conclusions of law, and order of court are dismissed.
>
> "The Prothonotary is directed to enter judg-

ment ordering and directing that the defendant render an account to the plaintiff (a) for all sales of brazing solders containing tin manufactured, and, since January 1, 1940, to the date of such accounting, sold by the defendant, all such solders being covered by U. S. Letters Patent No. 1,651,709 issued by the United States Patent Office to the plaintiff as assignee, and (b) for all sales of brazing solders containing silver manufactured, and, since November 16, 1937, to the date of such accounting, sold by the defendant, all of same being covered by said U. S. Letters Patent No. 1,651,709; that the plaintiff have the right to inspect the books and papers of the defendant; and that such account be rendered by the defendant within thirty (30) days from the date of judgment."

This judgment and order of court is final in that it defines the solders to be accounted for at the royalty rate specified in the license. The judgment has been filed and entered by the Prothonotary pursuant to the Court's order and would dispose of this litigation except for the order of the Chief Justice of the Supreme Court of Pennsylvania, entered July 10, 1944, which is as follows:

> "And Now, July 10, 1944, it is ordered that the Prothonotary of this Court for the Western District thereof, hold the record in the above-entitled case for a period of thirty (30) days from this date, within which time the appellant may make application to the Supreme Court of the United States for a Writ of Certiorari."

The decision of the Supreme Court of Pennsylvania is a finality on the merits of the case and every issue

here involved and they could not again be reviewed by any court of the State. There is no further proceedings in the court below except the satisfaction of judgment on the record, which is a ministerial function performed by counsel.

It is deemed that no reply to respondent's brief on the merits is required except to point out that on page 10 of respondent's brief it erroneously assumes that the construction given the *Sola* case by the Supreme Court of Pennsylvania is supported by the construction given that case in *Nachman v. Kay,* 139 F. 2d 781, decided by the Second Circuit Court of Appeals, wherein it followed its former decision in *American Cutting Alloys Inc. v. General Electric Co.,* 135 F. 2d 502. As we understand these decisions by the Second Circuit Court of Appeals, they construed the *Sola* case in the same manner as the Seventh Circuit Court of Appeals in *Chicago v. Katzinger,* 139 F. 2d 291, which respondent states is "bad law". The decision by the Supreme Court of Pennsylvania is therefore in conflict with the decisions of both the Second and Seventh Circuit Courts of Appeals.

Conclusion.

The authorities establish that the Court has jurisdiction to review the judgment below which involves important federal questions of anti-trust and patent laws.

Respectfully submitted,

WILLIAM B. JASPERT,
Counsel for Petitioner.

Pittsburgh, Pa.
September 22, 1944.